UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

Friday, September 28, 2018
3:40 p.m.

TRANSCRIPT OF HEARING ON MANUFACTURERS' MOTION TO COMPEL
BEFORE SPECIAL MASTER DAVID ROSENBLUM COHEN

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(Appearances continued to Page 2.)

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AFTERNOON SESSION, FRIDAY, SEPTEMBER 28, 2018 3:40 P.M.

SPECIAL MASTER COHEN: Thank you everybody for coming here. I appreciate all the people here in the room being here to inform me and educate me on a difficult complicated issue. And thank you also for coming at short notice. I'm gratified that everybody is here to help me with this issue even though I issued an invitation only three days ago.

It's my understanding that you have agreed to a format through which you're going to try and talk me through the issues that have to do with discovery from plaintiffs of prescription-related information. Am I right about that?

MS. SINGER: Yes.

SPECIAL MASTER COHEN: And who's going to start? Donna?

MS. WELCH: Yes. Do you want me to move to the podium?

SPECIAL MASTER COHEN: Wherever you are more comfortable doing it, but it makes sense to have a microphone in front of you. Whichever place you're more comfortable is fine.

MS. WELCH: So thank you --

SPECIAL MASTER COHEN: Let me just add one thing I just remembered. So I sent out an e-mail, I think it was early this morning or late last night, saying that I

had planned to spend a bunch of time to educate myself by re-reading everything you submitted, but then the Kavanaugh confirmation hearing was on TV, and so that was a little bit of a distraction; but I did spend much of today re-reading the letters that you sent, so I think I am up on the curve a little bit.

And so I just want to make sure that everyone understands that this is going to be a bit of a colloquy, that I will interrupt and ask questions, and some of what you are going to say I hope I already know. So I'm just letting you know the state of where my head is at.

MS. WELCH: Very good.

MS. SINGER: And David, just to help guide the argument, I think there are going to be 30 minutes on defendants' side all in, 30 minutes on our side -- we'll try to keep everybody honest -- and then a five to ten-minute rebuttal by defendants.

SPECIAL MASTER COHEN: Thank you.

MS. WELCH: So thank you for agreeing to hearing this in person, we appreciate it as well.

This is a key discovery issue from the defendants' perspective. It's discovery that we believe, as you know, goes to the heart of not only the claims, but our defenses in the case, where plaintiffs among other things allege fraud against the manufacturer defendants.

And as a shorthand, we've talked about this at a high level as the motion to compel prescription-level data. Specifically, we are talking about responses to three discrete interrogatories. And we are seeking identification of which prescriptions plaintiffs claim, first, were written in reliance on a defendant's misrepresentation or wrongdoing. That's interrogatory number 6. Second, which prescriptions were medically not appropriate, interrogatory number 10. And which prescriptions led someone in the community in the Track One jurisdictions to become addicted, thus causing the alleged damage in the community or the harm, that's interrogatory number 7.

In addition, we've sought to compel production of documents in response to requests for production 10, but I think the argument here really centers around the three core interrogatories.

As you know, and as is laid out in the papers, we've been seeking the discovery since the outset. With respect to the interrogatories, plaintiffs in the Track One cases have now supplemented their responses twice, but they have still failed to identify even a single prescription that they claim was medically improper or written in reliance on a misrepresentation by one of our clients.

For example, Cuyahoga in their supplemental response, their final one in August, identified a number of categories

of documents from which they say we can go out and figure out this information ourselves.

SPECIAL MASTER COHEN: Documents which they produced, right?

MS. WELCH: Yes, documents they say they produced, some categories where they say production is ongoing. Among those they've identified 4,300 overdose deaths from 2006 to 2017, but they haven't told us of those which were even an overdose death from someone who had been prescribed an opioid, let alone prescribed an opioid that was manufactured by one of our clients; let alone took an opioid and was prescribed an opioid by a doctor to whom a misrepresentation had been made, or a prescription was in their belief not medically proper; and thus we sought relief from you on August 4th.

And I want to be clear, that while we believe there's an issue here that is broader that relates to plaintiffs' burden of proof and what we think they'll ultimately need to do to prove their claims, that's not what we're here about today. We are here on a discovery issue, and it relates to whether we are entitled as defendants in this case to responses to those interrogatories now while fact discovery is ongoing.

We believe there are two central questions that you need to answer in order to make a decision on that issue,

and the first is obviously is this information relevant, and second, is it proportional to the needs of the case.

With respect to relevance, candidly, we don't think there's a lot to say here. They concede in their responsive letter brief that this is relevant to our defenses and that we're free to mount the defenses we choose. They've never contended this information isn't relevant to the defenses here.

And to be clear, for each of the manufacturers, the defenses include, for example, that our client didn't make any misrepresentations to a doctor writing prescriptions in the Track One jurisdictions.

Our defenses include that in writing prescriptions for our clients' opioids no doctor in the Ohio Track One jurisdictions relied on any misrepresentation. They include that the prescriptions written for the opioids marketed and sold by our clients were not medically inappropriate, that the addiction-related harm in the communities that these plaintiffs are seeking as damages was not caused by prescriptions written for our clients' opioids, but rather by something else, and that the majority of harm alleged by the cities and counties is not a result of prescription opioids at all.

We believe that both CMO-1 and your prior discovery rulings specifically contemplated that we'd be given the

ability to get this very type of critical information to support our defenses during fact discovery, and plaintiffs essentially claim they don't seek damages for personal harm, and therefore they should be allowed not to respond. They should be able to avoid this relevant discovery because they're not seeking personal harm for any individual.

Candidly, we believe that misses the point. They are seeking harm for prescription-level harm. They are seeking harm for what resulted from a prescription being written to an individual, not to the harm that that individual may have suffered him or herself, but to a slightly more attenuated harm felt in the community. But it is not aggregate harm that is not tied to prescriptions, it is harm from a prescription written to a person who either overdosed or a prescription written to a person who became addicted, and thus took services or took other services from the community that they wouldn't have taken. But it all at the end of the day boils down to the question of whether the prescription at issue, proper or not, was the prescription at issue written based on a misrepresentation.

SPECIAL MASTER COHEN: So let me ask you two questions. You listed a number of defenses that defendants would seek to interpose that have to do with, you know, particular prescriptions. To what extent are those fraud based? In other words, the defenses that you named and in

your letters have made reference to the fraud claims.

MS. WELCH: They relate to the fraud claims, they also relate to the other claims in the case, including nuisance. At the end of the day, we are entitled to understand what the alleged nuisance is and we're entitled to understand which if any prescriptions written of our clients' opioids prescribed by a doctor inappropriately contributed to the nuisance.

SPECIAL MASTER COHEN: So their theory seems to be, the plaintiffs' essential claim seems to be, you know, they say every prescription, every prescription that was written for an opioid was tainted. Every prescription was tainted because of the marketing activity of the defendants as a whole gave the wrong message to doctors in the medical community.

So for example, that a prescription that might have otherwise been legitimate was tainted because -- and again, this is an example -- it should have been written for three days and not 30, and the message to the medical community was you can write as many days as you want without fear of addiction except for extreme cases.

So for them to say in response to what you're demanding, every prescription, every prescription was tainted, I get that that doesn't address every single one of the points that you made, but does that at least address

some of them so that now we're looking at a smaller subset.

For example, just a subset of prescriptions that led to somebody's death in Cuyahoga County because of having used an opioid, and not somebody who, for example, is only a heroin user and never had a prescription opioid.

Do you follow that question?

MS. WELCH: I think I do, and I think it's an important question.

Let me start by saying I think we wish we knew what they meant when they said every prescription is tainted. From a liability standpoint, our clients cannot be liable for manufacturing and lawfully selling FDA-approved products. And I think even the lawyers on that side of the room would agree that not every prescription written in the Track One jurisdictions for an opioid was tainted or wrong, or shouldn't have been written in some fashion.

There are prescriptions out there that everyone should be able to agree were fine, were medically appropriate, were written for a person who needed them by a doctor exercising their judgment that was not relying on misinformation or misrepresentations, and we're entitled to know which ones are and which ones aren't.

But I think you're right, and I think what your question gets to is that there are two different ways to go about doing what we're asking that you require them to do.

And I think there's been discussion and meet and confers about the notion that this is an impossible task: You can't expect us to look at 10 billion prescriptions or 10 million prescriptions and tell you for each one was it medically appropriate or not.

But what they can do is first look at the prescriptions for which they've reimbursed, and I know they're not seeking damages based on reimbursement, but that's a universe of defined information that they know. And they can tell us for those reimbursed prescriptions, which ones do they think should not have been written. That's something that's relevant potentially to liability, to their claims, and to our defenses.

Telling us that they believe there's a taint or a swirl around all of the prescriptions doesn't help us defend, and we don't think gets them over the line, because causation is an element of every single one of the claims.

So on the one hand, they can start with some smaller universe. They did it in Chicago. In the Chicago case where they were ordered to provide this information, they didn't start with a billion prescriptions or a million prescriptions written in the city of Chicago. They started with the prescriptions that had been reimbursed, and they looked at those, and they applied a construct, prescriptions that had been written for over three months for

non-cancer-related reasons, and they came up with just over 250,000 claims. And from there --

SPECIAL MASTER COHEN: What database? More importantly, what would the equivalent database be in the Track One cases?

MS. WELCH: I believe here it's a combination of the CMS-reimbursed claims database with an overlay of the medical claims databases that give us the prescription reason, the diagnosis code is I think what it's called in many of these databases. And it's that universe of information I think from which they can start.

And let's use the 250,000 claims as an example. They whittled it down to there, but it was clear in Chicago that plaintiffs didn't believe that all 250,000 prescriptions written for over three months for non-cancer-related reasons, they didn't contend that all of those were improper. And they were ordered to identify which ones were improper and to explain the basis.

SPECIAL MASTER COHEN: Wasn't that only because they were seeking money damages in Chicago though?

MS. WELCH: I don't think the order was because they were seeking money damages for reimbursement of the claims. It was in the context of a case where one of the things they were seeking was reimbursement for those claims, but what they're telling you here is that even

though they are seeking even more attenuated damages, they shouldn't be required to identify the prescriptions that caused the harm.

So we think the rationale for why the Court ordered the identification of those prescriptions is equally relevant whether or not they're seeking reimbursement or not, and we think that the Court understood that when it issued CMO-1. The CMO-1 requirement likewise wasn't tied to whether or not they were seeking reimbursement. CMO-1 was tied to whether they were seeking damages relating to prescriptions that allegedly caused harm.

So we believe that it is clear that they can do it. That's one way.

SPECIAL MASTER COHEN: So let me ask you a question. There are three different interrogatories, as you said. Whether they were written on reliance from messages given by the defendants, whether they were medically necessary or unnecessary, inappropriate, and whether they led to addiction, let's just take the last one for a moment.

The addiction question, it seems like you can come at it two different ways. The addiction question, you can look at all of those cases where the plaintiffs had to deal with addicts, right?

MS. WELCH: We agree.

SPECIAL MASTER COHEN: And then look at

whether those addicts in fact ever took an opioid product manufactured or distributed by the defendants. So that's coming at it kind of from the population backwards.

Written on reliance, you could look at all of the scripts and basically say every single one, every single one a doctor in some way relied on. In other words, it's just that you might not like the answer, but it's a different direction at coming at the answer.

What I'm trying to figure out is how you would ask them to determine which ones are appropriate and which ones were not, and whether that ties more to the question of reliance or more to the question of addiction, if that makes any sense.

MS. WELCH: I think I understand the question, and I think with respect to which of the prescriptions were medically inappropriate or medically proper, it's not a question there of reliance on a misrepresentation. I think that is a related but separate question.

SPECIAL MASTER COHEN: Agreed.

THE WITNESS: I think when you're talking about medically appropriate or medically proper prescriptions, there are criteria that one might use to determine based on Mr. Reed's medical history whether the prescription written for two months or three months of opioids was appropriate given the medical circumstances.

We can't do that for them. The burden shifting, they would seek under Rule 33(d) to say we'll give you all the information, and you go sort it out if that's something that you want to see, but we don't know what criteria they're using. And again, the starting point in Chicago was three months, prescriptions three months or longer for non-cancer; but even of that population they seem to concede that not all of them were medically improper.

And so the next exercise was for them to look at those prescriptions, for them to look at the diagnosis code; why was the prescription written, and to tell us if they contend that it was a medically improper or medically inappropriate prescription.

SPECIAL MASTER COHEN: Are you saying they did do that in Chicago?

MS. WELCH: They were ordered to do that. We believe that work was in process when the MDL was formed and the case was transferred here.

SPECIAL MASTER COHEN: And then put on hold.

MS. WELCH: Correct.

SPECIAL MASTER COHEN: Go ahead.

MS. WELCH: Notably, the plaintiffs want to position this case as a case where it's going to be aggregate proof and so they don't need to do any of this and we're not entitled to it, but they themselves have demanded

vast amounts of individualized discovery in this case. They've demanded call notes and marketing communications, and virtually every document that would suggest that there was a communication to individual doctors. Why on earth would that be necessary in a case of aggregate proof?

They've demanded detailed transactional data. They haven't limited their requests for marketing materials to aggregate materials or materials that are sufficient to show what the messages were. They've wanted transaction and communication-level data that's highly individualized.

And they can't have their cake and eat it too. They can't say on one hand they're entitled to 20 years of individualized discovery, and we get none because of their theory of the case.

They also seek to avoid doing it now. And on the one hand, they may suggest to you that this is impossible. I think the two ways that you've discussed and that we've tried to frame how they could go about doing this shows it's possible. And there's not an affidavit in the record suggesting that it's not possible or even suggesting the burden. There's nothing in the record before the Court substantiating burden, let alone substantiating impossibility.

So perhaps recognizing that ultimately they will need to do this they try to avoid at least doing it now, saying

this is premature, these are contention interrogatories; maybe at the end of fact discovery, maybe in expert discovery. That's not enough, we need the information now.

SPECIAL MASTER COHEN: So your letters have said -- by the way, were you reserving five or ten minutes?

MS. WELCH: The discussion we had was 30 minutes for principal arguments --

SPECIAL MASTER COHEN: Okay.

MS. WELCH: -- and five to ten minutes for rebuttal.

SPECIAL MASTER COHEN: That's fine.

MR. BRADY: I was going to try to stop in two or three minutes to let the pharmacies --

SPECIAL MASTER COHEN: Well, as Kavanaugh did, I'll take two of them to ask or answer a question.

So your letters suggest -- and I think you wrote this, and I don't remember who else might have -- things along the lines of "or at least they should say so in the interrogatory." At least they should say we can't produce this, we can't do this. Okay?

So what if their response -- and I think it might be this -- is, look, we're not coming at the case this way. We're going to try and prove our case using aggregate proof, which perhaps the Court might not let them. Maybe it's a summary judgment or a *Daubert* issue and the case goes away;

but let's not get to that, we're not there yet.

They say we are going to commit to not using individual scripts to prove our case, we are going to commit to aggregate proof, and experts testifying about multiple regression analysis, and so on and so forth, to prove our case, as they did in other cases like Neurontin.

And if the ruling is, okay, fine, if that's how you contend you're going to pursue your case, then you can't use any individual prescription analysis, you can't point to any. You have to say so in an interrogatory. You have to commit in writing that you're not seeking damages based on individual prescriptions. And if it comes to trial and you want to rely on any of that, you are not going to be allowed to.

Okay. Why isn't that enough?

MS. WELCH: Well, first, even in Neurontin, which is the case that they rely on --

SPECIAL MASTER COHEN: I disagree with your -- I saw what you said, and I don't think that's right. I don't think that -- I should put it this way. I haven't read the whole case, but the quotation that you gave me that talks about individual proof, I don't think that there was individual proof. I think that it was a statement that there wasn't. I'd have to go back and read it; I admit I haven't done that.

MR. CHEFFO: I was one of the lead lawyers --

SPECIAL MASTER COHEN: You were there?

MR. CHEFFO: -- in the Neurontin case, yes. So there was individual proof. In fact, there was depositions of doctors that were used and shown.

SPECIAL MASTER COHEN: To whom by whom?

MR. CHEFFO: During the course of the discovery there was transcripts and depositions of doctors. The case involved Kaiser at the time, but doctors who prescribed.

SPECIAL MASTER COHEN: All right. So would you agree though that, again, I didn't read it, I was just given two or three lines from what I'm sure was a much more complicated opinion, but the essence of that opinion seemed to be the Court spurning of that level of proof, that kind of proof to get anywhere.

MR. CHEFFO: Well, there was a few things. I don't want to take up too much time, but I think -- and we can address Neurontin separately.

I think Neurontin was very different for a number of reasons. First of all, the case was all about off label marketing and promotion, and the theory was if it was used for and prescribed for certain disease end points that were not approved, then their claim was essentially that they were snake oil.

So then their methodology was to basically say if it was approved, if it was used for this type of disease and ICD 9 code, that therefore we think it was categorically improper.

Here it's approved for chronic pain, which is drastically different. You're right, this is also a *Daubert* issue, but there clearly was a lot of discovery in the case that went on. No one suggested that you couldn't raise these individual issues.

We ultimately in that Court -- and I think, you know, again, it is a case, it's there, we think it's distinguishable. It's frankly an anomaly and an outlier in all the other cases, and I think the difference there, as I said, was that Neurontin, gabapentin, the underlying medicine, was an antiepileptic drug that was approved for epilepsy and post-herpatic neuralgia, which is the disease -- or the pain from after you get herpes, and it was widely prescribed.

The claim was it was all as a result of off-label marketing and promotion and it shouldn't have, but it was very, very different than a medicine that's been approved for many, many years for pain, and the claim here is that you shouldn't, it didn't work for pain. So it's a completely different situation, I think, but we can brief that if you'd like.

Can I add two quick things? And we may want to turn it over.

SPECIAL MASTER COHEN: Ask Donna, not me.

MR. CHEFFO: Do you mind, Donna?

MS. WELCH: No, go ahead.

MR. CHEFFO: Just really two points. One was I think it's not correct, frankly, to say, you know, they may argue, they may say that it's impossible or they can't do it. In fact, and again, there's nothing in the record where they know how to find affidavits, and they haven't said that this is the time, we've kind of been through this before. There is no affidavit that says this is impossible.

In fact, we have given you evidence that it is possible. If you read the transcript from the Summit County Medical Examiner, they said that there's 213 deaths, overdose deaths in Summit County in 2015. We regularly look at the medical records, we look at the PDMP, OOARS as I think it is called here, and we actually do this analysis, and we have the right to get medical records.

So in fact, everything in the record says just the opposite, that it is possible. So it would not be right --

SPECIAL MASTER COHEN: That's the led to addiction question.

MR. CHEFFO: And the other point was I think you said with respect to can they just say, you know,

everything, can they just say it all. Right? I think that was the first point. And I would just address that briefly by saying this: Maybe in a complaint you can do that, I suppose, and just say we think everything was tainted, but I don't think -- and you know, again, they haven't done it, but I don't think they could say under Rule 11 or verified interrogatory response that we think every prescription that was written is somehow improper, without talking to any doctors, without looking at the prescriptions, without talking to the patients to find out if they actually benefited from these medicines.

Think about it. Patients continue to take a pain medication for years and years and years because it didn't work? And they didn't know it? And they somehow didn't work? Doctors continued to prescribe it for years and years and years to patients in chronic pain, and it didn't work?

So I don't know how you can make the allegation under essentially the rules that would apply and say we think every prescription written in Cleveland, Cuyahoga, Summit, or Akron, was somehow improper, and we're just going to wave our hand over it without actually doing the type of work that we're talking about, which is actually defining the narrow universe.

The last thing I'll say, David, what we're really asking for is if we don't have this type of information it's

a needle in a haystack, because essentially what we then have to say is here is this potential universe of thousands or millions of claims. Maybe we think some of them we want to hold you responsible for billions of dollars and all this types of relief, injunctive relief, but we'll tell you later, or maybe we won't know, or maybe when you get our expert report.

That's not the way it's supposed to work. You've asked us to produce tens of millions of pages of documents and information. We basically said you've made a claim that many people were injured, that many people were harmed, that there were these prescriptions that led to bad things.

I think it's a plain vanilla kind of argument we are making, which is show us those prescriptions. We shouldn't be required to look at every prescription ever written and try and divine which ones might be at issue here.

SPECIAL MASTER COHEN: 30 seconds to wrap?

MS. WELCH: Yes. I'll wrap up by saying it's not sufficient for them to just say we can't do it or we shouldn't have to do it. It's clearly relevant to Mark's point. We have produced millions of pages, and the discovery rulings that are relevant to the defendants set the frame for proportionality here.

SPECIAL MASTER COHEN: I agree. I agree.

I see some folks in the back row kind of looking at

each other like maybe they want a turn, and I don't know what the agreement is, so I'm looking to you to tell me.

MR. DELINSKY: David, if it's appropriate.

MS. SINGER: Two minutes.

MS. WINNER: I think we have three.

SPECIAL MASTER COHEN: I'll let you have four.

MS. WINNER: Thank you.

MR. DELINSKY: Thank you, Special Master. Eric Delinsky on behalf of CVS. I'm speaking on behalf of the other major pharmacy defendants, as well; Rite Aid, Walgreens, Walmart.

Special Master, we have comparable interrogatories and we join in the manufacturers' arguments. All interrogatories are different. We have two of them, they're set forth in the two letters we've provided to you on the subject. I won't get into them unless it would be helpful to you.

But suffice it to say, our two interrogatories are very tethered to plaintiffs' claims. In other words, they seek the prescriptions, the filling of which plaintiffs contend caused them harm, and for which they seek recovery. They're narrow in that fashion.

The reason why I requested a few minutes to speak is simply to explain how this category of discoverable information pertains to the pharmacy defendants, and frankly

to our distributor defendants as well, because it's different than as to how it pertains to the manufacturer defendants.

The pharmacy defendants and the distributor defendants aren't claimed, aren't alleged to have engaged in a fraud. Those aren't the claims against us. Thus there's no room for a claim by plaintiffs that all prescriptions that involved any of us are somehow tainted.

Cases like Neurontin and cases like ConAgra, all of which involved sales and promotional activity, do not pertain to the claims against the pharmacies and other distributors. The claims against us are based on the idea that we shipped orders of prescription opioids to pharmacies that were allegedly suspicious, and that we therefore should not have released from the warehouse. Even as pharmacies that's the allegation against us because, as you know, Special Master Cohen, we are sued in our capacity as distributors. The allegation is not that all of the shipments were improper, it's that some slice of them were suspicious and shouldn't have been shipped.

For plaintiffs to make their claim, the next step is they then have to show that pills or controlled substances from these suspicious orders caused them harm, and the link to that claim are the prescriptions that were filled. In other words, the prescriptions that were illegitimate in

nature, that pills from these allegedly suspicious orders were used to fill. Those prescriptions are the link, Special Master Cohen, between the conduct alleged against us, the suspicious orders that we allegedly shipped, and plaintiffs' harm.

In the pharmacies' interrogatories --

SPECIAL MASTER COHEN: Let me ask you a question. If the plaintiffs can identify for you the suspicious orders alone -- just those, right, which presumably they would do using ARCOS data or some other mechanism; but they come back and give you a spreadsheet, here are all the orders that are suspicious -- why do you then need any additional link of which pill from which prescription caused harm?

MR. DELINSKY: That's a good question, and the answer is as follows: An order can be deemed suspicious, we're talking about the wholesale level, so an order can be suspicious due to its wholesale size, its frequency, and other characteristics about it, none of which have anything to do about how those pills ultimately are used.

So in theory and as a practical matter, this is most often how it very well turns out, a suspicious order can be shipped from a wholesaler to a pharmacy and result in no ground level diversion at all. Every single pill in a suspicious order could be used to fulfill a perfectly

legitimate prescription, and the order is simply deemed suspicious because from a wholesale perspective it was too large.

So that's why identification of the suspicious orders or the alleged suspicious orders themselves are not enough. It doesn't provide us any information about the core theory is that the drugs in the suspicious orders then were diverted, and diverted in a way that caused the counties or the cities harm.

SPECIAL MASTER COHEN: So I think your time is up. Thank you for that. When we come back to you, another thing that we haven't touched on but is clearly on the horizon are the 30(b)(6) topics. And one of the things that I would ask you if we had two more hours to go into is to what extent can the information that you're seeking be sufficiently answered in writing. So remember to address that when we come back to it, and if you would address that to some extent, Linda, during your presentation, that would help me.

MS. SINGER: All right. I am just going to stand here.

So first of all, actually I think there are three basic issues that are raised by defendants' interrogatories. And by defendants, I am principally referring to the manufacturer defendants.

The first is that we don't have a list, the CT-1 bellwethers do not have a list of medically unnecessary prescriptions to produce to defendants, and we cannot produce what we don't have. That's first.

Second, we have provided, however, the underlying data to the extent that we have it, and I'll describe what that is, and a host of individualized information from which defendants can draw their own conclusions. And under Federal Rule of Civil Procedure which defendants have not addressed, that is sufficient to identify the business records.

And third, you know, this idea of medically unnecessary prescriptions is really a creature of defendants' making in this case. You will never find it in any of the CT-1 bellwether cases, it is not how we intend to prove our claim. It is different than the city of Chicago case.

And I'll stop there for one minute since you asked about it, and I know Miss Welch spoke about it for some time. In that case there were false claims allegations, and those false claims allegations turned on whether the claim was false because it caused doctors to submit and certify and the city to pay prescriptions that couldn't be covered by their plan which required that they be medically necessary or appropriate. That's not the claim here. The

cities and counties have specifically disclaimed seeking reimbursement for those claims. So those are the three core issues that I'm going to speak to.

One other thing I just wanted to note, you addressed some of these issues when they came up in the context of RMPs in discovery ruling 1, and so we're not coming to this issue on a blank slate, though a discovery ruling six weeks or two months ago feels like dog years in this case. But you know, there defendants were seeking medical records, insurance records, pharmacy records for any individual we claimed was harmed; documents related to any patient who received, obtained, or were harmed by improper or medically unnecessary prescription and claims data.

And there you made the same analogy I think you drew from your questions today, which was that we can't conflate discovery with sufficiency of proof. And I think many of the arguments defendants are making relate to the fact that they think a case proved by aggregate proof is insufficient, but that doesn't go to the core discovery issues.

SPECIAL MASTER COHEN: Well, they clearly think it's insufficient, but they interpose a different issue, which is that regardless of which way you choose proving your case, they're allowed to defend it the way they want to, and the information they're asking for is highly relevant to their defense.

MS. SINGER: And I will get to that. I think the short answer to that, which I'll come back to, is first of all, we've produced lots of claims data for defendants to provide their own analysis of; and two, we have provided 265,000 documents with individualized proof information in it. And I will talk about what some of that is. So it is not the defendants don't have information, what they don't have is our identification of prescriptions according to their theory of defense.

SPECIAL MASTER COHEN: Well, would you even be willing to say, okay, here are all the 265,000 documents that reflect, for example, whether -- I'm not sure what they reflect, but I assume for example that they would reflect that a given patient was prescribed opioids and had some sort of bad outcome.

MS. SINGER: So I thought it might be helpful to talk about this a little more concretely, so I will jump ahead. I'm sorry, I only have one copy.

MS. WINNER: Do you have a copy for us?

MS. SINGER: I only have one.

MS. WINNER: Can you tell us what it is?

MS. SINGER: Yes, I'm going to talk about it.

SPECIAL MASTER COHEN: Is this in the record --

MS. WELCH: Well, this was not provided in

advance.

MS. SINGER: I'm going to go through it.

MS. WINNER: The top summary isn't Bates stamped. Is this a produced document? Because some of the remainder appears to be hearsay --

MS. SINGER: I promise that I will explain what's here.

So what's here is a summary that was created by counsel of some of the individualized proof that has been provided in the case with Bates numbers to give you a sense of the kind of information that is had, and then examples with Bates numbers from defendants' produced documents.

And I raise this only to your point about the kind of information that defendants have available to them. And let me come back to that later. I did have one other thing that I wanted to submit.

MS. WELCH: Special Master, we object to the introduction of this evidence here at the hearing. It's lawyer-created, it wasn't provided in advance, and we've had no opportunity to go back and look at what this information is and how it would be used.

MR. CHEFFO: This has been pending for months and months. I think you know that, David. Obviously it'll be decided at the time of jury trial, but this is highly improper to basically spring this on us in the middle of the

hearing when you haven't seen it, and we don't even know what it is.

MS. SINGER: I could not agree with that more -- to get back to the microphone. You know, we received letters this week that defendants have come here to argue about that we haven't even responded to.

MR. CHEFFO: That's not true.

SPECIAL MASTER COHEN: We're getting off topic. So I don't need to see these.

To go back to my original question. Okay? So I assume that in here are autopsy reports, are medical records of the decedent, are prescription records of the decedent, but that seems to be insufficient for them to do what you say they can do. It seems like they would also need at least this: There are the records, you can do it as well as we can, but our conclusion is that anyone who was prescribed -- perhaps this is what you think -- our conclusion is that anyone who was prescribed an opiate product that you manufactured or distributed and ended up dying is someone who falls within the category of someone who was responsive to your interrogatory, that is they received medically inappropriate treatment. Is that --

MS. SINGER: So again, with you for almost all of that except the concept of medical necessity, which is not again an element of our proof or claims here.

SPECIAL MASTER COHEN: Okay, so let's take off the last little bit. My question is, you haven't given that description. You haven't said what I just said in an interrogatory response.

MS. SINGER: That we contend that all -- I'm sorry, say it again, David.

SPECIAL MASTER COHEN: You know, I'm not suggesting what answer you should give, but one of them could be --

MS. SINGER: A description of the types of conduct and prescriptions and injuries that we consider covered by our complaint. I think our complaint lays that out, and we can certainly respond to an interrogatory to say that. I think we have said that repeatedly in correspondence with defendants.

I understand that interrogatory responses are different --

SPECIAL MASTER COHEN: Yes.

MS. SINGER: -- but I think here the core issue that defendants have been talking about is not a description of a class of conduct and claims, but specific identification of prescriptions, providers, pharmacies, patients. And that's what we don't have. And I think it might be helpful to think about their request in two categories. One is data we don't have, information we don't

have.

SPECIAL MASTER COHEN: And that you could say in an interrogatory we do not have, correct?

MS. SINGER: That's right. And I think again we have said that in our objections and responses.

SPECIAL MASTER COHEN: Okay.

MS. SINGER: Two is underlying business records, claims data, autopsy records, medical reports, addiction treatment records to the extent that they can be produced under federal law, EMS runs, police records, court files; all of which very specifically cover individual X, typically named, picked up on this corner with prescriptions of opioids bearing CVS pharmacy dispensing.

SPECIAL MASTER COHEN: Some of them do, but I presume some don't.

MS. SINGER: That's true.

SPECIAL MASTER COHEN: You know, there are, I'm sure, without having gone through any of the data, that there are folks who overdosed on heroin and never took an opioid prescribed, manufactured, or distributed by the defendants. Right?

MS. SINGER: Of course.

SPECIAL MASTER COHEN: And would you claim, do you claim -- that's kind of part of their question -- that the cost that stems from that particular event is something

they should pay for because it's part of the nuisance, for example?

MS. SINGER: So the complaint alleges, and I think the scientific evidence on this is clear, that roughly 75 to 80 percent of people who use heroin first started with a prescription opioid. And you know, I think this is one of the difficulties of mapping defendants' arguments to ours.

When defendants marketed their opioids, first of all, a lot of it was unbranded, right? It wasn't specific to a particular product. As you pointed out, a lot of the impact of their marketing, it may have been Janssen that was doing the marketing or Teva, but could have led to a generic or a Purdue prescription that may have caused the physician or the patient to stay on the drug longer or go to higher doses, both of which are far more dangerous. That becomes the real difficulty of teasing that out from the data.

What we do allege is that the defendants engaged in pervasive marketing campaign. It touched virtually every source of information. Defendants did it because it worked, they watched it work, and in their internal documents is lots of information where they talk about increased prescribing and the impact that their marketing is having.

You know -- and I think the example that Miss Welch gave is an instructive one, call notes. You know, we've asked for individualized proof. We should be expected to

produce it ourselves.

Defendants maintained call notes in the course of their business and they have produced them to us. We haven't told them to go out and have their sales reps write down everything they said to doctors and doctors they visited, but where they've kept those records they're responsible for producing them. That's exactly what we have done here, and I think Federal Rule of Civil Procedure 33(d) specifically says that where the response for an interrogatory can be found in a business record then you're entitled to direct the requesting party to those business records. And we have done that at great length.

And one of the things we looked at prior to this hearing, because after defendants raised these issues we asked them some of the same questions, because they clearly articulated that it is relevant to their own defense strategy, and that, you know, we think they have information that they are asserting we have.

So we asked them the same questions, and interesting to look at how they responded to that, if I can find it. So Allergan, Miss Welch's client, represented that it was a contention interrogatory that was not ripe. Purdue promised to produce IMS data, so the sales data that they buy, and their abuse and diversion detection data, so that we could assess that ourselves.

Janssen --

SPECIAL MASTER COHEN: I missed something. These are responses to what?

MS. SINGER: Interrogatories that plaintiffs served.

SPECIAL MASTER COHEN: Asking what?

MS. SINGER: Asking for prescription data.

So I think by defendants' own theory, their own responses, they say they can't do it. They say it's information in the hands of third parties, they're contention interrogatories, and they're premature because discovery is not done. And we don't even have, again, these lists.

I also want to offer, because defendants have raised as an argument that we have not built a factual record here, and I just got this this afternoon, but it is a declaration on the fact that --

MR. CHEFFO: We're going to object.

MS. SINGER: Can I finish speaking?

MR. CHEFFO: Usually people wait until there's an objection heard before they give the evidence to the Judge.

MS. SINGER: He hasn't looked at it.

MR. CHEFFO: So again, David, same rules.

MS. WINNER: Again, on behalf of the

distributor defendants, may I ask for a copy of this declaration, please?

MR. CHEFFO: I think it's the same objection. I can't even get through it to know what it is. There's not even been a proffer. It is clearly highly unusual, if not highly improper. We've been at this for a very long time. The record is what it is, and if we allow this type of conduct, this will never end.

You know, if counsel had something that was probative or interesting or useful, they know where to find us. They could have just sent this, and we could have evaluated it. But to kind of spring it in the middle of hearing -- they didn't even come to us before and say, oh, by the way, we have this information, we'd like you to look at it. They are just trying to spring it on us, and you, in the middle of a hearing.

MS. SINGER: Again, defendants are making the argument that we haven't provided a record. We're here at the hearing. If defendants want to keep the record open -- but to say that we haven't identified a burden in compiling information that we've produced to them --

SPECIAL MASTER COHEN: Let's talk about burden. How would you characterize the burden that was placed on the defendants in discovery production?

MS. SINGER: In what regard?

SPECIAL MASTER COHEN: What adjective would you apply to characterize the discovery burden that I placed on defendants?

MS. SINGER: This is a large complex case. Defendants have produced significant number of documents.

SPECIAL MASTER COHEN: Tens of millions. Would you say it was a heavy burden?

MS. SINGER: I think it is a burden that's proportional to the complexity and significance of this case. And I would also note that much of the production that defendants have made in this case is of material that was previously produced in other investigations of their conduct, while plaintiffs have responded with I think for Summit County and Akron close to 3 million pages of documents, each of which have been gathered in the course of this litigation for this litigation. So both parties have engaged in significant discovery.

I think the inquiry that's relevant for FRC 33 is where the answer to interrogatory can be found in the business records of a party that the question is who bears the burden of answering that question. And again, Federal Rules say if the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, and if the burden of deriving or ascertaining the answer will be substantially

the same for either party, which is certainly the case here, we don't have the answer in our records, we would have to do exactly what defendants would have to do here.

SPECIAL MASTER COHEN: Well, even as to the prescriptions, okay, so defendants have databases, they have access to data, IMS, whatever it is, that identifies every script written of opioids. Okay? They have that. And so if we just look at that, they've got it, they can get it; you've got similar data, you can get it. But you said 70 percent of those, 70 percent of heroin users started out with -- I think that's what you said -- started out with an opioid script; that they don't know.

MS. SINGER: So again, with many of these, kinds of questions they are only knowable at an aggregate level. Maybe one way to think about this, when defendants set out to market opioids for chronic pain to dramatically expand the market, they didn't know if you were going to end up with a script or I was going to end up with a script. They didn't know whether it would go to somebody with a mental health history or a history of substance abuse, or childhood trauma.

What they knew was that a significant portion of those patients would become addicted. And to try to go back person by person and figure out who that was, the fact is, on an aggregate basis, on an epidemiological basis, we know

that 20 percent of the population is going to have those characteristics because of the nature of this drug, particularly when taken long term and at high dose. They're going to become addicted, they're going to overdose, and they're going to die, and that's just what happens.

And this building and parsing of this case prescription by prescription is not how it works in the real world because, again, it wasn't marketed to you, it wasn't marketed to me.

SPECIAL MASTER COHEN: Do you think that -- I'm going to jump way down the road, kind of a theoretical hypothetical. Do you think the defendants should be precluded as an evidentiary matter from bringing in doctors and asking them if they relied on any of the marketing messages that they sent out?

MS. SINGER: You know, not having that question in front of us and just as an immediate reaction to that, I think if defendants can identify doctors who they want to bring in -- and again, they know who they visited, they know who wrote prescriptions -- if they want to bring them in to say that, sure. I think the fact-finder will have to assess the probity and the relevance, the value of that evidence. And that was I think one of the findings in the Neurontin case.

SPECIAL MASTER COHEN: Right. But if they're

allowed to do it as a matter of a defense, which maybe is a worthless defense, okay, I can imagine all the arguments you would make as to why that is an irrelevant piece of evidence in the case, but if they're allowed to do it, then can't they discover the information necessary to find out who the doctors were and which scripts were written, and which ones you say are wrong and inappropriate, and whether they relied on messages from the defendants?

MS. SINGER: I think three answers to that. One is they're entitled to do it from the information they have, and they have vast amounts of that information. They were the ones out there doing that marketing.

Two is they can do it from the information that's in the documents we produced to them, so we've produced Cuyahoga, Cleveland, Summit, and Akron's claims data. We have produced that to them.

There are limits on how they can use it, but they have that information from us, and they can come back to you. We'll argue against it, but they have information on those doctors, and then they have these 265,000 documents just from Summit alone that show autopsies that often identified the prescribing doctor, that showed the individual, arrest reports, court records, all of those places. Prosecutions of doctors for running pill mills. There is lots of raw information in that discovery that let's them build this

defense and.

I think, again, the core difference here is that defendants are permitted to pursue their defense. They're permitted to seek relevant evidence from us, and we're producing that evidence in significant volumes, and we've pointed them to that evidence.

What they can't do is require us to go out and create that evidence so they have it in an organized fashion to do that. Again, asking us to apply a medical necessity screen, which is not something we used in that complaint, I don't even know how we'd define medical necessity because we don't use it. So how do we go about doing that?

And again, I want to come back to the FRCP 33(d) argument, which I think is really at the center of this question that we're grappling with. You know, the rule directs that the responding party may specify the records that must be reviewed in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could.

The advisory committees from 1970 note the subdivision gives the party an option to make the records available and places the burden of research on the party who seeks the information. Quote, this provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery on its potential benefitee.

SPECIAL MASTER COHEN: I know how 33(d) works, and I've applied it before. And I am having trouble understanding how -- it's a question of how -- it's an issue of how the question is framed. They're framing a question that is different than the question you want to answer, but the questions that they're asking, for example, "led to addiction," how are they supposed to take the records that you have provided and figure out which scripts led to addiction and which ones didn't?

MS. SINGER: Often the records will say. Patient admitted with history of Opana use or prescription opioid use, or oxycodone.

SPECIAL MASTER COHEN: So is it your position that in every instance where --

MS. SINGER: No.

SPECIAL MASTER COHEN: Then how are they supposed to know?

MS. SINGER: So I think where we have a clash here is that, again, we have chosen to proceed on the basis of aggregate proof because, again, that's how this marketing and that's how the harm works in the real world. Defendants want to offer a defense, and they're getting literally reams of information from us to help them build that defense. They will have a chance to challenge the sufficiency and the methodology of our proof. They will have a chance to offer

their own evidence, doctors they want to bring in, patients they want to bring in, addiction treatment experts, their own regression analysis. They'll have lots of ways to prove their defense.

And I note, one of the cases we cite in our letter to you is a case by the United States Department of Justice against Life Care, a nursing home, and it played out in exactly the same way in that case. It was a false claims case, so a case where in any case the burden was on the government to say these are the claims that are medically unnecessary. And there the district court said in denying defendants' motion to compel, defendant is not simply requesting that the government disclose discovery. They're essentially requesting that the Court impose the affirmative burden on the government to identify each claim in the total universe of claims which could be categorized as false.

It goes on to say, simply because the defendant may choose among these options -- and it goes through all the ones I just discussed -- to pursue a litigation strategy that relies on a claim-by-claim review does not justify placing the burden on the government to be the party that performs that review.

They will have the claims data. They've also issued subpoenas to the state Medicaid agency, state board of health, the state addiction treatment agency. They've asked

for all of this information. They among their own records have dispensing data, you know, all of that information, IMS data. CVS has PBM data on treatment.

And we've provided them, by the way, not just with prescription claims data, but medical claims records that can be matched up. I mean, it is for our slice of the universe that we see, which is a fraction of the population of Cuyahoga and Summit, because the only claims data we have is for the people who worked for the cities and counties.

Defendants actually through their own records have a lot more information than we do, but we've provided what we have.

SPECIAL MASTER COHEN: So let me ask you about that. The claims data is data for county and city employees, right?

MS. SINGER: That's right, and their dependents.

SPECIAL MASTER COHEN: And it includes whether they ever received a prescription for opioids --

MS. SINGER: That's right.

SPECIAL MASTER COHEN: -- and whether there was any -- well, do any of the databases also reflect for those people whether they ever had addiction issues?

MS. SINGER: It includes their medical records, where the provider -- right -- typically the city

and county have different prescription vendors from medical claims, but we've produced them both for the periods we have those records.

SPECIAL MASTER COHEN: I guess I am trying to figure out whether it's your position that every single one of those prescriptions of opioids was part of the opioid crisis.

MS. SINGER: Part of the opioid crisis: I want to say back to you the way we would say it and the way we have articulated it in the complaint, which is defendants through their marketing and distributing of the opioids caused an oversupply, an overuse of opioids in the cities and counties, which caused an increase in all sorts of public health and public safety issues that the cities and counties had to pay for.

And so that happens, again, at an epidemiological basis, and it is the difference between defendants saying we have to prove every script and add them all up together, but that's again not how the harm is created, because it's not about whether you got the script or I got the script, but that we knew that a percentage of the population was going to get it, and we caused harm.

It is a sideshow of personal injury cases that are very different standard of proof in those claims instead of what these plaintiffs have asserted in this case.

And I guess the one other way I'd say it is that defendants are entitled to their defense, and that is the reason that we are producing all of the documents; the raw data, the records of the sheriff, the police, the EMS runs, the Narcan, courts, all of that stuff for them to go through; but what they're not entitled to is to decide on our offense what information we have to put together and categorize in order for them to proceed with their defenses. We can give them the raw data, we can give them the documents. And just as we have to put our case together from their documents and our investigation, they have to do that themselves.

And so again, if we were asking defendants to create records of what every sales rep said, or -- I guess that's the best example that comes to me -- and they didn't have them, we couldn't under 33(d) or Rule 26 proportionality require them to create it. And that's what they're seeking to have you require us to do, and there's no reason we should bear the burden for their defense.

SPECIAL MASTER COHEN: If I disagree with you, let's get to the topic of answering in writing in 30(b)(6) topics. How do you address that?

MS. SINGER: Answer which question in writing?

SPECIAL MASTER COHEN: I'm not even sure. There are a whole bunch of interrogatories that touch on

this.

MS. SINGER: So the interrogatory that asks for us to identify medically necessary claims, again, I don't know how we would do that when we don't apply a medical necessity definition in our case.

SPECIAL MASTER COHEN: I said interrogatories, I meant 30(b)(6) topics. There are a whole bunch of 30(b)(6) topics where they say, well, at least plaintiffs can do it in writing.

MS. SINGER: I mean, to the extent that we have created the information or someone who can answer the questions as one would in a 30(b)(6), but we can't instruct someone to answer medical necessity questions when it's not information that the city or cities or counties keep in their regular course and they don't have the expertise to do.

And to the extent that any of these things are going to get created, it's not going to be through city and county employees, it's going to be through expert testimony.

SPECIAL MASTER COHEN: Okay. I think that's a half an hour. Is anybody keeping track?

MS. SINGER: It felt longer.

SPECIAL MASTER COHEN: That's my job.

MS. BIERSTEIN: Actually I wanted to just say about one-and-a-half minutes on pharmacies, but before I do

that I wanted to underscore something that Linda just said which I think is maybe getting a little lost here, which is that what Mark argued earlier was that the burden should be on the plaintiffs to find this -- to identify the medically unnecessary ones, because he said we don't know what you mean by medically necessary.

And I think what Linda was saying, and I just want to underscore it, is no, we don't know what you mean by medically unnecessary because it's not our term. You can word search the complaint, it's not there. And because it's not our term, we don't know what they mean. And if we don't know what they mean, it's not in terms of who would be more appropriate to do it.

SPECIAL MASTER COHEN: Let's change the phrasing then. What I think you do say in the complaint is that there was an oversupply, that there were excess prescriptions written, or at least excess pills prescribed. So let's change it a little bit to say, okay, guys, plaintiffs, identify those that are excess.

MS. BIERSTEIN: Well, I think -- and that is a question that actually segues into I think what I was going to talk about, which is the pharmacy questions, because that's not a question manufacturers have asked, but it is a question that pharmacies are asking.

They're asking us to define what the appropriate

number of pills into any jurisdiction would have been, that's in one of the interrogatories. So I want to answer it again quickly, because I don't want to push on the time thing here. In the context --

MS. WINNER: Just to save time, this is Sonya Winner for the distributors, I believe you're referring to something that's not ripe, we've all agreed is not ripe. It has been submitted.

SPECIAL MASTER COHEN: You objected to this.

MS. WINNER: Yes.

MS. BIERSTEIN: Okay. So if we're not going to argue about that, let me say I believe your question goes to that particular interrogatory. It's not one that the manufacturers have asked, and it is one that the distributors have asked, and we're not going to argue about that one today. That's fine.

What I would like to say about the pharmacies though is you heard an argument, and I know this is switching gears, you heard an argument about why even if the pharmacies are only sued as distributors the dispensing information is necessary, because what counsel is arguing is that you don't know that the shipment of a suspicious order led to harm unless you have the dispensing information.

That's not the position the pharmacies take when we ask for dispensing information, so when we've requested

information about their dispensing records the answer we get is, well, you haven't sued us as a dispensary, so you can't get the records. So either they're relevant they're or not, the two issues are tied together or they're not. But what we're hearing is they're tied together when they want it, but they're not tied together when we want it.

I think separate and apart from that, the issues raised by the pharmacy interrogatories are actually not similar to the issues raised by the manufacturers. There's an overall similarity in the sense that they're individualized data, one dealing with prescriptions and the other dealing with shipments, but when you drill into the issue I think they're not similar, because the issues that are overarching are theses contention interrogatories, when is the appropriate time to answer them and who has the records look very different.

The question about suspicious orders, which ones are suspicious, suspicious prescribing, these are clearly expert analysis questions. They're not questions that would be done upfront at this point in discovery because any analysis you would do of suspicious ordering is clearly an expert question. So those interrogatories would call for expert analysis, and to the extent that that is part of our case, and that's another big difference, to the extent that that is a term we use and is part of our case, it may be an

analysis we need to do, but it's an analysis our experts are going to do. So the deadline for us to do that is when we provide our expert report, not when we answer upfront early interrogatories. So I think that is a key difference between what's happening with the manufacturers and what's happening with the prescribers.

The other difference is we need the discovery from them to do it. They want us to say which prescriptions they dispensed we say were diverted. They won't give us the prescription information. So it's another reason besides the issue of expert analysis, it's another reason that it's a question that would be answered later in the discovery process after we get the information.

SPECIAL MASTER COHEN: So that --

MS. BIERSTEIN: I think that's it, I'm going to sit down.

SPECIAL MASTER COHEN: So you're saying then that if you do get the information from the pharmacies that you can answer the question.

MS. BIERSTEIN: I believe -- as to whether we can answer -- it may be that there will be one or more of the questions that say we are unable to answer at some point, but it's premature for us to figure out whether we can answer it or we would abandon some aspects of our claims if we couldn't answer it. I think this is not the time to

know that until we have both the underlying information and the expert analysis to tell us what we have.

SPECIAL MASTER COHEN: Before we go back to defendants, Linda, I just want to ask you this question: If we frame it just a little bit differently and we say identify for us the prescriptions that represent an oversupply, not the ones that are medically inappropriate, which is their terminology, or unnecessary, which is their terminology, but the ones that represent an oversupply, the ones that shouldn't have been written because it's more than should have been written, whether it's the script as a whole or the number of pills, or however you want to define it, how about that?

MS. SINGER: I think that is -- A, it's a little difficult because that's not the question they've asked, and I think they're trying to pursue a theory of defense that is about turning this into lots of personal injury cases, and proving each -- creating a trail of proof that is marketing to script to patient to harm, right, to payment by the city and county, which is again not our case.

That said, oversupply is going to be an expert question. It's not going to be something that we could answer on the basis of fact written discovery.

SPECIAL MASTER COHEN: Okay. Let me ask you, I want to be cognizant of your time. When do people need to

leave to get flights, and so on? When does everybody want to be sure this is over?

MR. CHEFFO: I can't speak for the plaintiffs, I think we've all assumed that it would be two hours, so I think we're going to try to keep it within that.

SPECIAL MASTER COHEN: 5:30 everybody wants to be up, walking out.

MR. CHEFFO: I think we started at 3:40.

SPECIAL MASTER COHEN: I just want to make sure nobody is missing planes.

MS. WINNER: 5:30 is what we were anticipating.

MR. REED: Special Master Cohen, I've tried to honor the time agreement. We're going over a bit, but I would like to have a couple of minutes. I think this is a very important issue.

MS. WINNER: And as would I, if possible.

SPECIAL MASTER COHEN: If your compatriots are late it's your fault, I want to get it clear, it's not my fault.

MR. REED: Understood, I'm willing to accept that.

MS. WELCH: I will start briefly, and let Steve and Mark chime in.

The choice by plaintiffs to proceed by way of

aggregate proof does not relieve them of their obligation to participate in discovery. They can choose the way they prove their case, they cannot deny us the discovery we need to defend, and this is critical discovery that we need to defend. It's critical discovery that we can't do ourselves.

I want to take Miss Singer's three points.

SPECIAL MASTER COHEN: Let's say you win across the board, you get every ruling you could wish for. Explain to me how you use it at trial.

MS. WELCH: Let me give you an example of 230 overdose deaths in Summit during a particular time period. Theoretically they are asking us to pay for the harm associated with a national crisis. They're asking us to pay for the harm associated potentially with every single overdose death.

We should be entitled at trial to say of 230 overdose deaths, one, or perhaps zero, were of a person who took a prescription for one of my client's products or one of the other defendants' products. That one or zero were prescribed an opioid inappropriately.

And they want to talk about medically unnecessary being our term. It's not our term. The term in their complaint is necessary for legitimate medical uses. So we need to understand which prescriptions they claim were not necessary for legitimate medical uses in a framework where

our clients marketed and sold lawful drugs that were FDA approved. And if a doctor wrote a prescription for someone and it was necessary for a legitimate medical use, we are entitled to defend on that basis. And if a doctor wrote a prescription for one of our clients' products and that prescription didn't result in any harm, we're entitled to defend on that basis.

SPECIAL MASTER COHEN: So why can't you say, well, Court, jury, here are the 230 scripts that we wrote, they were all legitimate.

MS. WELCH: The universe of prescriptions in total for each of the defendants is a large number.

SPECIAL MASTER COHEN: It's equal for them to identify them, or you?

MS. WELCH: It's not equal because we don't know which ones they believe were not necessary for a legitimate medical use. To allow us to start with the ones that they claim resulted in harm or that they claim were not necessary for legitimate medical use narrows the universe to something that then we can begin to seek third-party discovery on. But that is a relevant question, it's framed by their pleadings, and it goes to the heart of our ability to defend.

They talk about an overall taint and an overall supply, but what we didn't hear them say is that they

believe every prescription for an opioid written in the Track One jurisdictions during the relevant time period shouldn't have been written or weren't for a legitimate medical use, or that they did all result in harm.

And they are the ones in a position to know which ones they think shouldn't have been written because they weren't for a legitimate medical use, they are the ones in the position to know which ones caused the harm, because we don't even know what harm they are seeking reimbursement for or seeking damages for right now.

They need to identify that universe so that we can do the third party and other discovery to come to trial and say, of those 5,000 they've identified, here's the answer. Number one out of 5,000 was Mr. Jones. Mr. Jones had X condition. Mr. Jones' doctor will testify that the prescription was necessary. If Mr. Jones died, it was for X, Y, or Z other reasons; or perhaps Mr. Jones is living a productive life, and the prescription did not result in any harm to the communities here.

SPECIAL MASTER COHEN: What about the problem of -- well, let's just put it this way: What about Life Care, how do you deal with Life Care where the Court says I don't have the time -- I can imagine the Judge saying this, I can imagine a judge I know pretty well saying this -- we don't have the time to allow you to go through 5,000

prescriptions one by one and prove they're all legitimate, and in Life Care the Court said we're not coming at it that way, we're just not coming at it that way.

MS. WELCH: Ultimately how we put on the defenses is a question for another day. This is a discovery question about what relevant information we're entitled to to determine what defenses we put on and how, and to show why the aggregate proof model that Miss Singer and the plaintiffs want to use doesn't work and why it's inappropriate.

SPECIAL MASTER COHEN: I don't think you'd prove that an aggregate model doesn't work and is inappropriate by going through -- maybe I'm wrong, I'm not committing to this position -- but it seems like you prove the methodology is wrong perhaps or that the assumptions and inferences are wrong, but not by going through one bit by one bit by one bit, and all thousand million data points are wrong.

MS. WELCH: We need to be able to challenge the inputs, and if an expert is using an aggregate proof model that suggests every prescription opioid on the work we've done, were necessary for a legitimate medical use, but we can't get to that level of proof without individualized discovery.

SPECIAL MASTER COHEN: Okay.

MS. SINGER: Can I clarify a factual question? I know that they have time, but since Miss Welch raised the death reports, I think that's a perfect example of the kind of information that has been produced.

So 230 overdose deaths, whatever the number is in Summit County, it's too many, but so we have produced data and documents from the Medical Examiner's Office that includes the name of the individual, their medical records, as I know you know well; the type of drugs they were taking, including the prescription number, the doctor who prescribed it; the cause of death, the toxicology reports.

You know, if you look at this data, the medical examiner file has a drug list that includes the prescriber name, the drug, name, the amount of strength, the quantity --

MR. REED: Your Honor, at some point -- Miss Singer has had her opportunity.

SPECIAL MASTER COHEN: Go ahead, Steve.

MR. REED: I'll be very brief. I think Miss Welch covered this.

I will start by stating the obvious. We are here on a discovery motion. I have not heard the plaintiffs say that this evidence that we have asked for -- that this discovery that we've asked for is irrelevant, they simply could not. These are relevant facts that we're entitled to ask. We

think they're relevant to their claims; these facts are plainly relevant to our defenses. That should be the end of the discussion on relevance.

Proportionality, I think, Special Master, your questions suggest that you get the point. We think this is clearly proportionate.

In terms of whether they should be required to put in the effort to create something, their interrogatory requests, I think Miss Welch has already addressed that, but this notion, if you look, step back, look at their complaint, I think they studiously avoid using the phrase medically unnecessary or medically inappropriate, but their entire case is founded on this notion that these FDA drugs were prescribed in inappropriate ways because of something each of our clients did.

And setting aside the question whether these fraud-based claims should have been pled with particularity, that's a different issue. I'm past that for now. I'm entitled to ask for the facts. I'm entitled to ask them what they contend my client said or did that caused them harm. Each of their claims requires causation as an element. It is clearly relevant to this case.

And they do use the phrase, and I'll point you to each of the Track One complaints, paragraphs 9 and 14; 14, in each of the three complaints, is where they talk about

prescriptions that were not necessary for legitimate medical uses.

We've heard today that the plaintiffs don't know what "necessary" means. If that's true then they shouldn't have alleged it in their complaint. I don't believe it's true, and the only way that we're going to focus this massive case on the facts -- on the disputes at issue is if they tell us what they think is in contention, what is at issue, and then we have a chance to attack it.

We can't tell them what they think is necessary or unnecessary. They're the plaintiffs with the burden. We need to know what the basis of their claims is so that we can actually join issue at trial if we get that far.

SPECIAL MASTER COHEN: And what if their response is we simply cannot answer that question and do not know?

MR. REED: Special Master, I think the issue for you is whether they should be ordered to do it. What they do once they're ordered to we can deal with on another day if we have to.

MR. CHEFFO: I have three quick points, Special Master Cohen. The first is this idea that -- the idea that it is not on somebody's word processor or list, there is a lot of interrogatories responses, I can assure you, all the defendants have answered that didn't just pop

up on some list; and they didn't exist before, yet we have had to do it. So it is not a document request where -- if it exists, we are not making them create new documents. But their interrogatories, just like 30(b)(6)s, that's what you do. Lawyers go out, they do the work, and they find the information.

The second is we spent a lot of time, and I think my colleagues have done -- I really have nothing more to add on this issue of necessary for legitimate medical use. As you can see, if you were to write an order and characterize it exactly the way it's in the complaint, we certainly wouldn't quibble with that.

But I think the other point I would just raise, and you highlighted this earlier on, that's one of the three prongs, right, just this kind of medical necessity or legitimate medical use. The other is remember they're saying basically anybody who was addicted or anyone who overdosed or died, right? So those would be something, that's the reason why we need these records.

And there's always some irony, because Miss Singer, who I don't think answered one of your questions, got up and said, well, look, there's only 210 of these deaths, or 250; so our answer should be then it should be easy, because if you were to look at the document, and I know that because I took the deposition, the vast majority will say, I think

there's five or six oxycodone or hydrocodone when you look at the tox reports. All right? So if you were to look at the cause of death you would not find -- you'd find heroin, methadone, cocaine.

So of the 210 deaths, I think it was, in 2015 in Summit County, for example, it's exactly the point you've been raising. What are we supposed to do with that? What are we supposed to do with that? We say, okay, we now know ten people have oxycodone in their system, or hydrocodone, when they died. Okay?

But this idea that somehow mysteriously they're going to bubble up and we're going to understand their theories, what we're really coming down to is, again, this is discovery. We did not frame the complaint. Our discovery is only as broad as the breadth of their claims. They are basically saying this huge panoply of people sustained harm and damage, and we want compensation for that.

And all we're asking, as in any case, is okay, tell us which ones, so we can then do our homework in the limited time that we have, as opposed to what they continue to say is trust us, some percentage of people, not all; we don't really know, we don't want to tell you right now, but not all. At some point we're going to tell you 60 percent, 70 percent.

And then what are we supposed to with that? Are we

then supposed to reopen discovery, move the trial date, because when we get an expert report in six months from now? Now is the time to basically say, you've made these allegations, you said omissions, misrepresentations, fraud led to people doing things that caused us harm. And if this was a plain vanilla any other case you would say, yeah, you have to basically tell them so they can do the discovery to find out if in fact that happened.

MS. WINNER: May I speak very briefly?

SPECIAL MASTER COHEN: Sonya, I know you have been waiting patiently, kind of patiently.

MS. WINNER: I won't take very much of your time. And I'm speaking for the distributors here, and we have joined in this motion.

And I would echo what Mr. Delinsky said earlier about how this discovery is also very important to the distributors and to the pharmacies even though the claims against us are different. And the reason for this is that the claims against the distributors rest on an extremely attenuated chain of causation.

And I think it's important, again, not to confuse, as Miss Singer said, how the harm was created, what their theory of the case was, as opposed to how they intend to prove their case.

In terms of their theory of the case, as I understand

it, their theory is that there were inappropriate, excess, however you want to put it, prescriptions that were written by doctors who were influenced by the manufacturers. Those prescriptions were then improperly filled by pharmacies who shouldn't have filled them. The pharmacies in turn obtained the medications that they used to fill those prescriptions through what the distributor should have recognized as suspicious orders; that some of the patients who filled those prescriptions at those pharmacies became addicted to the medications; that those people then did things that caused the plaintiffs to spend money on emergency services, treatment, and other things that they claim as damages and harm here.

This entire edifice is built on there being bad prescriptions out there. And whatever phrase you use to describe the bad prescriptions, we're entitled to know what those bad prescriptions are, because without that information we can't trace whether anything we did several links down the chain has anything to do with the damages that are alleged here.

SPECIAL MASTER COHEN: Well, that's not quite true, because without knowing precisely which prescriptions were not medically necessary, at some point the inference becomes so strong that a prescription was not legitimate that a fact-finder could conclude that the order was

suspicious. I mean, wouldn't you agree that -- I'm just thinking theoretically -- if a given pharmacy is blowing out a million pills a day, okay, then you kind of have to suspect maybe this isn't legit.

MS. WINNER: Well, it could be, it could be that it is not. Probably not a million pills a day.

SPECIAL MASTER COHEN: Purposely I'm being ridiculous.

MS. WINNER: A very large number. It could be that is a pharmacy supplying a large hospice, for example. It could be a pharmacy that for a variety of reasons actually has very good reason to send out large volumes.

SPECIAL MASTER COHEN: I purposely chose a ridiculous number just to make a point, that you don't need to know for sure every script, you can infer it.

MS. WINNER: If the claims against us are limited to orders that are pharmacies putting out a million pills a day, you know, I think this case would get pretty short though. So that's really not what the claims come down to. It's much subtler than that, and so we need to be able to know whether what is being called a suspicious order actually did end up in the hands of people who shouldn't have gotten the pills, shouldn't have been given the pills; then went out and did something wrong that caused harm to these plaintiffs.

SPECIAL MASTER COHEN: Okay. I think we spent enough time on this, and I don't have any more questions, and we have roughly 20 minutes more.

What else should we talk about?

MR. CHEFFO: I think, and we could do this very quickly, I think we covered many of the things. I think we would like to since we're here talk about the 30(b)(6) topics; again, unless you have anything on the other one. And I think we could skip over some of them that may have been covered. And I would be happy to try to do my portion in 6 or 7 minutes, give my colleagues 3 or so minutes, and give the plaintiffs 10, and we could finish at around 5:30, if that works for you.

SPECIAL MASTER COHEN: Well, just so that we're on the same page, Mark, I'm looking at the July 18th letter from you, and starting on page 5 it lists specific topics, and the first one is topic 3.

MR. CHEFFO: That's correct. I can give you a quick little score sheet that might make it easier for you. There are 13 topics --

MS. CONROY: I hope there are Bates numbers on them.

MR. CHEFFO: No, I meant verbally; and I don't hand things up during the middle of hearings.

MS. BIERSTEIN: If he writes it down we'll

object.

MR. CHEFFO: That's funny.

There are 13 topics, I believe, that the plaintiffs have indicated they have refused to put up a witness, and they are 4, 5, and 6 -- these are a little bit out of order -- 19, 29, 3, 13, 7 and 8, 9, and 34, 14, and 30.

So what we've done, David, you know, I won't kind of cover too much old ground, but you had -- just to remind you -- as to Purdue, I'll use that for example, you had overruled our objections as to 39 of these 30(b)(6) topics. The plaintiffs have essentially said they want to reduce us to 20, so there's 13. I will tell you, of the 6 -- because we do listen and we did try to work with the plaintiffs; and sometimes we work things out, and that's great, sometimes we don't -- as to 6 of the 13 we basically said, for example, we will take a written response.

Like so for example, on the 30(b)(6)s 4, 5, and 6, which broadly deal with the issues we've been talking about so we don't need a 30(b)(6) on all of the prescriptions -- in other words, someone to talk about those -- what we've said is we would then to the extent that we have follow-up questions, we would talk about the process. Right? So if you give us the list, then we would talk about those process issues. So that's 4, 5, and 6.

I think we've done the same for what I'll call this

hybrid approach, and that's identifying individuals who became overdosed or addicted to opioids to the extent that there was a written document about that. We would of course then ask for the process, how you know, how you came to that, so that we could understand.

And as we've talked about I think at some length, Summit County, for example, does do this, we know it. We haven't gotten through it. We've highlighted Summit County because, frankly, that's the only one we have taken the deposition of. I fully expect there will be a similar process for others, but we'll find that out when we take additional depositions; but they have this type of information.

So that's 19 is the "Identify individuals who overdosed or became addicted to opioids." Again, the issue here is there's probably -- and you know, you pick up the paper, and obviously it talks about opioids, no one is disputing that, but to the extent, as you said for example, someone unfortunately took carfentanil or fentanyl, overdosed, never had an opioid prescription, nothing to do with it, that's going to wind up in the overdose statistics. We want to understand which ones are they carving out and then find out how they did that.

SPECIAL MASTER COHEN: Let me interrupt you.

MR. CHEFFO: Sure.

SPECIAL MASTER COHEN: You rattled off the numbers pretty quickly. I'm just going back to your letter.

MR. CHEFFO: Yes.

SPECIAL MASTER COHEN: Many of these overlap with the topics we have already spent an hour and a half chatting about, but some of them are different, some of them don't.

MR. CHEFFO: Correct.

SPECIAL MASTER COHEN: It's those I want to focus on. For example, topic 3.

MR. CHEFFO: Okay. That's marketing, promotional issues.

SPECIAL MASTER COHEN: Right. So the way it's I assume paraphrased, maybe not, in the letter is "Any promotion, marketing, or educational activities concerning prescription opioids in or concerning plaintiffs' geographic area." This seems to be asking them to tell you what you did.

MR. CHEFFO: Correct. And so let me just -- so the answer is -- and again, to the point of you have given us guidance previously, right, don't ask things that are too overly broad, what we basically did -- and I don't frankly know if you have it in your letter, but certainly I can tell you -- what we basically did, they objected on overbreadth grounds, and we agreed to limit the testimony to

place the plaintiffs' knowledge of and efforts relating to the concerns or complaints regarding the marketing or prescription of opioids in the community. So in other words, as opposed to them saying that the question is, you know, you're asking us to tell us what you did, that's too broad. Right?

We said, okay. What we're really asking for and what our intention was, and we'll clarify, is what we're asking for is you to tell us the information that you're aware of. So for example, if they received complaints from doctors, you know, that goes to statute of limitations issues, it goes from others, it goes to their efforts.

SPECIAL MASTER COHEN: Complaints from doctors, I mean, I'm not saying that as narrowed it's not inappropriate now.

MR. CHEFFO: Yes.

SPECIAL MASTER COHEN: Complaints from doctors isn't promotion, marketing, or educational activities. It sounds like what you're asking for under topic 3 is of all of those promotional, marketing, educational activities in which we engaged, tell us about the ones you knew of.

MR. CHEFFO: Well, not -- yes, to the extent that they were tracking it. I mean, again, if the answer is they weren't and they don't know, it should be an easy answer.

What we are trying to understand is tell us, in at least this question, tell us the promotional activities that you had information about. Right? So again, if someone is claiming we didn't know you were doing X, Y, and Z, we are entitled to understand, again, because you've just heard one of their claims seems to be that there's this ubiquitous kind of marketing machine of all the defendants together, and we've basically asked them to the extent that they were tracking our information about that, because again there are other manufacturers and folks who would market and perhaps distribute, that we think we're entitled to that information.

I mean, again, in the grand scheme, David, these are relatively discrete, I think narrow. Theirs are similar. But we're trying to build obviously a defense on various things. This should be presumably very easy. If someone tracked this information then they should have someone who can tell us about that. If they didn't, then they'll tell us that, as well.

SPECIAL MASTER COHEN: Topics 24, 25, and 26 concern communications from plaintiffs and various parties, entities, and members of plaintiffs' communities. Talk to me about that.

MR. CHEFFO: Sure.

SPECIAL MASTER COHEN: It is on page 8 of your

letter.

MS. WINNER: That's not at issue.

MR. CHEFFO: Those aren't at issue, David. Do you want me to read them again slowly?

SPECIAL MASTER COHEN: If they're not at issue --

MR. CHEFFO: Those are not at issue.

MS. WINNER: Perhaps it could be helpful if you refer to -- the letter dated August 31 has a summary chart attached to it, and the plaintiffs submitted their own chart dated September 4th, and that will list the specific topics that are at issue at this point.

SPECIAL MASTER COHEN: And I don't have that quickly available.

MS. WINNER: I have a clean copy which I'll be glad to show to the plaintiffs, if they're willing to let me give it to you.

SPECIAL MASTER COHEN: Well, this is a letter I already received, correct?

MS. WINNER: Yes.

MR. CHEFFO: What date is this? This is a plaintiffs document, this is yours. This is the plaintiffs' letter.

SPECIAL MASTER COHEN: Thank you. I'm sorry.

MR. CHEFFO: That's okay, there's a lot of

paper floating around.

SPECIAL MASTER COHEN: Yes, I looked at this this morning and didn't bring it.

MR. CHEFFO: Like I said, lots of paper. But there are 13 topics that are still -- you know, the good news is I don't recall exactly how they got resolved, but probably through a meet and confer, which is good.

SPECIAL MASTER COHEN: Yes, it is. And topic 30, plaintiffs' knowledge of the DEA setting quotas, again, explain to me what you're really after here.

MR. CHEFFO: I'm happy to try to. This is one I was probably going to punt to my colleagues, the distributors.

SPECIAL MASTER COHEN: Anybody on the left side?

MS. WINNER: Okay. We were going to punt to our papers on this one, frankly.

MR. CHEFFO: I can address it if you want.

MS. WINNER: We can address it. As you know, the DEA, I'm sure you know the DEA sets quotas for prescription opioids, and we want to know, we agreed to limit this topic to testimony about information about their discussion or their evaluation of any involvement with actions relating to the DEA's actions.

In other words, did they try to get involved with the

DEA, saying you're allowing too much? Did they evaluate internally whether they should have talked to the DEA about it, that sort of thing. I wouldn't think -- this would probably be a very short topic.

SPECIAL MASTER COHEN: It is conceivable that their answer, that the deponent's answer would be we have no knowledge of any quotas that the DEA set, right?

MS. WINNER: That's entirely possible, which would make it a very short topic.

MR. CHEFFO: Or a writing to that effect. I mean, if that was, you know --

SPECIAL MASTER COHEN: And so causes of, quote, the opioid crisis?

MR. CHEFFO: That is 9 and 34, that's what I have. I think, David, generally the factors other than the conduct of any defendant that you believe affected prescribing. So again, you know --

SPECIAL MASTER COHEN: China and the Internet.

MR. CHEFFO: Right. Again, if the plaintiffs want to stipulate that they were aware of that, that they know that, that they've known it for 20 years. These are issues that I can tell you why --

MS. WINNER: I think we're entitled though to some deposition testimony about what knowledge they have about other causes of the crisis.

MR. CHEFFO: Yeah. I wasn't saying that we're going to take just a running, but I'm saying these are factors that are within very important areas, including statute of limitations, alternate causation, you know.

To the extent that there are factors here and to the extent they're going to have a model, you asked about that earlier, you know, to find out and to be able to depose whoever it is they're going to proffer for that as to whether they have accounted for these various issues. So there's multiple ways, both in our defenses, but also a lot of this information is going to be needed, you know, ultimately for our experts, and frankly in discovery and depositions of their experts. And these are not particularly broad topics.

SPECIAL MASTER COHEN: Do plaintiffs want to address the topics that I just listed?

MS. SINGER: That would be David Ackerman and Sal Badala.

SPECIAL MASTER COHEN: Ah-hah. Let me see if I can figure out how to press the button on the phone.

I'm going to un-mute you, and hopefully Sal and David will be able to respond.

Are you guys there?

MR. ACKERMAN: This is David Ackerman, I am here. Sal, are you there as well?

MR. BADALA: Hi, Special Master Cohen, this is Sal Badala.

SPECIAL MASTER COHEN: Greetings. Welcome into the courtroom.

MR. ACKERMAN: Thank you.

SPECIAL MASTER COHEN: So whoever wants to hit that tennis ball back over the net.

MR. BADALA: That's fine. Special Master Cohen, I will first address topic 3. Plaintiffs did offer a written response to this topic, defendants refused to accept a written response. We think it would be more appropriate for them to accept a written response at least on this topic.

To produce a witness would be overly burdensome in the sense that a witness would have to go through the entire defendants' production just to prepare for this 30(b)(6), so we think a written response would be better.

As for topic 30, we're kind of confused there's even an issue here. It was the defendants that proposed limiting this topic to what efforts, if any, plaintiffs may have made to --

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MR. BADALA: -- the quota setting process, and the defendants put it in their July 18th letter, and then

they went back and expanded even further their topic. So we think that to the extent that we have to put up a witness on this subject that it be restricted to what they had actually proposed in their July 18 letter, not to the expanded version that they now offer.

And I believe going back, now I believe the next topic you referred to was topic 9. We actually offered a written response, and I just want to get some context about written responses. We had offered written responses for eight topics. The defendants haven't accepted all of those, but just in context of the litigation, for plaintiffs 30(b)(6)s served on defendants, some of the defendants have ranged up to 13 to 26 topics that they're providing written responses on. So you can see that it's not equal in the sense that we're being forced to put up more witnesses on these topics where defendants are actually providing written responses for up to 26 topics.

And I'm sorry, I believe the next one was topic 34.

MR. ACKERMAN: Can I jump in real quick on 9?

There's an issue, Special Master, with number 9, that it's just not described with particularity. The factors other than the conduct of any defendant, I don't know how to prepare a witness for that. If there are specific factors that they want to talk about, they could describe --

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conference.

MR. ACKERMAN: But to just say the word "factors" is too vague for Summit County or Cuyahoga or Cleveland or Akron to effectively educate a witness to testify.

SPECIAL MASTER COHEN: Okay. And what was the next one? 34?

MR. BADALA: Yes. David, I don't know if you wanted to go, but I think 34 is the same issue.

MR. ACKERMAN: I think 34 and 9, that's almost the same topic, right? Nine is the factors other than the conduct of the defendant, and 34 is causes of the opioid crisis, and then there's an italicized paragraph that says, identification of any individuals other than defendants.

So they seem to me to be the same topic, and I think the same arguments we've made with respect to 9 apply to 34.

MR. CHEFFO: I think 9 and 34 are actually quite different. I know they're related to impact, but 9 talks about the factors, the conduct of the defendant that you believe affected prescribing practices for prescription opioids in your community. So that talks about factors impacting doctors' prescriptions. It shouldn't be that hard, these are the kind of claims they're talking about. Are there any other claims that they think or any other influences on doctors, that's one.

The other is the causes of the opioid crisis. And as that term is defined, that's what it says in the second amended complaint. So to the extent, for example, they have information about trying to interdict postal deliveries from China or Mexico, or whether it's pill mills, or whether doctors are engaging in illegal conduct, or any host of issues that one would think have been considered by these sophisticated municipalities, those are the types of things, because again their complaint doesn't say that, you know, there's these 50 other constituent causation and then there's these two or three groups.

They're basically saying the opioid crisis was caused by the defendants in this case, and it's certainly, I think, a legitimate cause of inquiry to say, okay, are you aware of other causes.

And then the same thing, their claim appears to be many of these doctors prescribed based apparently on some type of detail or messaging or omission, and to the extent that they have information then I think we will find in these depositions that there are other causes of these. Those are legitimate areas of inquiry.

The last thing I will say on this is that this has to be balanced. We're not looking in the context of what you have seen, the incredible breadth of the types of information; you know, tell us every process that went into

marketing messages, and people that you funded or lobbying activities. So there is an element of these are important issues to us, and I don't think that -- if the answer is they don't have it, they don't know, then they could just basically tell us that and give a sworn statement on that, and then we'll kind of move on.

MR. BADALA: Special Master Cohen, if I may respond to that just quickly.

I think that Mr. Cheffo's argument demonstrates the problem with the topic. There are clearly some sort of underlying causes that defendants want to focus on, but they're not going to tell us. They're going to play hide the ball, and somehow we have to educate a witness on, you know, guess the topic, and if somebody shows up in a deposition and starts asking questions about some unknown thing that the defendants claim caused the opioid crisis and our witness says, well, I don't really know anything about, you know, migration from this particular pill mill in Oklahoma or something, then we're going to get a letter that says, oh, your witness wasn't fully informed to testify on this, and you have to bring them back.

This is exactly the problem and why the topic isn't described with particularity to allow us to functionally educate a witness to testify as to the knowledge of the governmental entities.

SPECIAL MASTER COHEN: If the deponent says "We don't know that question, we don't know the answer to that question, we don't know what other causes of the opioid crisis is, we don't know," that's a sufficient answer. You don't have to prepare them to know anything they don't already know.

MR. CHEFFO: Exactly. That would be our position. Their obligation is to poll the people who would literally know and ask them. My guess is we're not going to find no one in Cleveland who is going to say we have no idea. Someone will likely say here is the various causes, they will be questioned about those, and if they're asked are you aware that this is a cause, or do you believe it, if their answer is no or I don't know, it's next question.

MR. REED: Could I jump in for a second? If you look at the topic, it says "The factors other than the conduct of any defendant that you believe affected prescribing practices." That's 9, right? So on that, they're not going to be sandbagged because we're asking what they believe. They can't be surprised by that. By definition, we're asking about what they believe.

SPECIAL MASTER COHEN: But they could believe it is because the moon is made of green cheese, so I'm not sure I like that either.

MR. CHEFFO: You know, these are corporate

type reps, so this would have to be the position of Cleveland or Cuyahoga, and presumably Cleveland doesn't believe that it's caused by something, you know, kind of outrageous or impractical.

SPECIAL MASTER COHEN: Well, I get it.

MR. BADALA: And if I -- just one more very brief point on this. You know, as Mr. Cheffo said, it's a representative of the governmental entity, and this is not an issue where it's lobbying, and where you can go to the lobbying department of the defendant and figure out who knows everything about lobbying. This is a question of causes of the opioid crisis. In order to provide testimony regarding that on behalf of Summit County, you have to go to virtually every single agency or employee of Summit County.

MR. CHEFFO: That's just not true. There's reports that are on the Internet about the opioid crisis, about deaths, about overdoses. If you ask the medical examiner what she believes is the cause of death of many of the people who overdose, she would say it's the fentanyl problem. These are not questions that are unanswerable.

SPECIAL MASTER COHEN: Okay.

MR. BOEHM: If I may, at least --

COURT REPORTER: (Interrupted.)

MR. BOEHM: I was just making the point that at least some of plaintiffs have set up task forces charged

with the very purpose of trying to determine what the causes of the opioid crisis is. This is truly not an issue that should be a challenging one, at least in those instances.

SPECIAL MASTER COHEN: All right, folks. It's a little bit after 5:30, and as I said, I am determined not to make anybody late to a plane.

So thank you all for your input. There are a lot of issues here, I will get to them as soon as I can. I am not going to issue anything from the bench, and I will think very hard about everything you've given me.

Thank you all very much.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Heidi Blueskye Geizer October 1, 2018

Heidi Blueskye Geizer Date
Official Court Reporter